

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

HOME IMPROVEMENT SERVICES COMPANY

Employer

and

Case 19-RC-294031

**NORTHWEST REGIONAL COUNCIL OF
CARPENTERS**

Petitioner

DIRECTION OF ELECTION

Home Improvement Services Company (Employer) provides installation and replacement of windows and doors for residential customers.¹ On April 13, 2022, the Northwest Regional Council of Carpenters (Union) filed a representation petition seeking to represent approximately 38 installers, trainee installers, lead installers and leads, and warehouse workers in the Employer's Anchorage and Fairbanks, Alaska, operations.

The appropriateness of the petitioned-for bargaining unit is not in dispute; the only issue is the method of election. On May 9, 2022, the Employer and the Union entered into a stipulation in lieu of a hearing on this matter. Pursuant to the stipulation, the Employer and Petitioner were permitted to submit written statements regarding their position on the method of election no later than May 16, 2022. The parties did so, with the Employer maintaining a manual election held at a single polling site in Anchorage is mandated by Board precedent and the current realities of the COVID-19 pandemic, and the Union contending a mail ballot is appropriate.

The Board has delegated its authority in this proceeding to me under § 3(b) of the Act. Applying the Board's decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), to the circumstances in the instant case, I am directing a mail-ballot election for the reasons addressed below.

I. METHOD OF ELECTION

A. The COVID-19 Pandemic

The COVID-19 pandemic has had a profound impact on daily life in the United States in the last year. Despite unprecedented efforts to limit transmission, to date more than 80 million people in the United States have been infected with COVID-19 and almost 1 million people have died.²

According to the Centers for Disease Control and Prevention (CDC), “[a]ttending a large gathering or event increases your chance of being in close contact with people outside your

¹ The names of the parties appear as amended by stipulation.

² CDC, *Covid Data Tracker* (updated May 17, 2022) <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last viewed May 17, 2022).

household and being exposed to COVID-19.”³ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: Get vaccinated, stay 6 feet away from others, avoid poorly ventilated spaces and crowds, practice good hygiene, and use masks when around other people.⁴

Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted the way the Board conducts its elections. The Board has traditionally conducted in-person, manual elections and used mail-ballot elections in limited circumstances. In 2020, in *Aspirus Keweenaw*, the Board addressed the circumstances where the pandemic may dictate appropriate use of mail-ballot elections. As the pandemic has ebbed and flowed over the years since *Aspirus* the result has been an increase in the use of the mail-ballot procedures. *KMS Commercial Painting, LLC*, 371 NLRB No. 69, slip op. at 1 (2022) (304 mail ballot elections taking place in fiscal year 2022). Mail-ballot procedures have allowed the Board to continue conducting elections even in the face of high COVID-19 transmission rates. As the Board stated in *KMS*, “during the pandemic, the Board’s mail ballot procedures have served the Board’s mission of ensuring free and fair elections, while also ensuring the health and safety of employees, parties, and Board personnel throughout the election process.” *Id.*

B. Board Standard

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.*, 325 NLRB at 1144-45.

The Board’s longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, § 11301.2.⁵ However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, *supra* at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including this Region’s, directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the

³ <https://www.cdc.gov/coronavirus/2019-ncov/your-health/gatherings.html> (last viewed May 17, 2022).

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last viewed May 17, 2022).

⁵ I note that the provisions of the Casehandling Manual are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6, 2020, the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45, the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by *GC Memo 20-10*, "Suggested Manual Election Protocols;"
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

Id., slip op. at 4-7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the "extraordinary circumstances presented by this pandemic."

Id., slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot "under the peculiar conditions of each case." *Id.*, slip op. at 3 (citing *National Van Lines*, 120 NLRB at 1346). The Regional Director's determination to conduct an election manually or by mail is subject to an abuse of discretion standard. *Aspirus*, 370 NLRB No. 45, slip op. at 3 (citing *San Diego Gas & Electric*, 325 NLRB at 1144 n.4). Finally, in *Aspirus*, the Board noted that a Regional Director who directs a mail-ballot election under one or more of the foregoing six situations will not have abused her or his discretion. *Aspirus*, 370 NLRB No. 45, slip op. at 8.

C. Position of the Parties

Both parties timely filed briefs.

The Employer contends that a manual election held at the Anchorage facility is appropriate, noting that the Regional office is not operating under mandatory telework status, a manual election would not violate mandatory health orders, the Employer agrees to abide by *Memorandum GC 20-10*, and it will certify that there has not been a COVID-19 outbreak at its facilities prior to the election. The Employer does not state whether the 14-day trend in cases is increasing, but rather takes issue with applying *Aspirus* here. It argues that case rates vary

widely from week to week, the Centers for Disease Control cautions against basing decision-making solely on community transmission data at this stage of the pandemic, and states that the *Aspirus* factors no longer reflect the current state of the pandemic or scientific guidance.

The Employer contends that employees in several classifications are based at the Anchorage facility and do not travel outside of Anchorage, but it acknowledges that installers and lead installers do travel for work and some of these employees are based out of the Fairbanks facility. The Employer also states that all eligible voters have the same start time.

The Union argues that a mail ballot election is appropriate. It argues that the petitioned-for workforce is “scattered,” working in job sites throughout the state of Alaska. It further states that the Employer’s facility is at least 2,000 driving miles, or a 3-hour plane ride, from the Regional Office in Seattle, and that the Employer’s facility in Fairbanks is about 350 miles from Anchorage, requiring the Agency to incur substantial person-hour and travel costs in the event of a manual election. It therefore argues that under *San Diego Gas & Electric*, 325 NLRB 1143, a mail ballot is appropriate. The Union also notes that the COVID case rate is increasing statewide and in Anchorage and Fairbanks.

II. Determination

Several of the *Aspirus* factors are not relevant to my determination in this case. The Region tasked with conducting the election is not operating under mandatory telework status, mandatory state or local health orders relating to maximum gathering size are not at issue, the Employer has committed to abide by *Memorandum GC 20-10*, and there is no evidence of a current outbreak at the Employer’s facility. Ultimately, I have determined that a mail ballot election is appropriate in this case due to the remaining factor: the 14-day trend in number of new confirmed cases in the county where the facility is located is increasing, or the 14-day testing positivity rate in that county is 5 percent or higher. I have addressed the Employer’s arguments regarding these statistics below.

The Board in *Aspirus* directed Regional Directors to, in considering these statistical factors, use the data published by Johns Hopkins University, or from official state or local government sources. The Board further stated where county level data are not available, Regional Directors should look to state-level data.

The first contingency at issue here is whether the 14-day trend in number of new confirmed cases in the counties where the facilities are located is increasing. The state of Alaska publishes COVID-19 data once a week on Wednesdays.⁶ This reporting frequency is reflected in the data published by Johns Hopkins, with non-reporting days reflecting a “0” as a null value, not an indication of zero cases. The Alaska Department of Public Health & Human Services publishes COVID-19 data on a 7-day basis, as does Johns Hopkins and the CDC; the 14-day rate could presumably be extrapolated by summing two 7-day rates.⁷ There is a slight discrepancy between numbers posted on Johns Hopkins’s website and those on the state of Alaska’s website,

⁶ <https://coronavirus.jhu.edu/data/state-reporting-frequencies>.

⁷ <https://experience.arcgis.com/experience/af2efc8bffb4cdc83c2d1a134354074/> (last viewed May 17, 2022).

perhaps because of corrections to the data. For the week ending May 10, 2022, according to the state's website, there were 1,525 cases, a 6 percent increase from 1,433 the week prior (week of May 3).⁸ The Johns Hopkins University & Medicine Coronavirus Resource Center reported 1,623 new cases in the state of Alaska in that time frame, a 10 percent increase from the prior week's 1,464 cases.⁹ All these sources show that between the week ending April 27 and the week ending May 3, the case rate stayed approximately flat.

The state of Alaska uses the term "borough" as the equivalent of county. The state posts borough-level data only for the current week, making it impossible to calculate change over time at the borough level. However, according to the state, Anchorage combined city-borough had 630 cases in the week ending May 10, 2022, and Fairbanks North Star Borough 127, representing a large fraction of the state's total cases.¹⁰ The CDC reports that Anchorage's case rate increased 11.76 percent in the 7-day period ending May 15, 2022¹¹ and Fairbank's rate increased 7.56 percent.¹²

I also note that it is undisputed that employees in several classifications travel within the state for work, which renders the statewide COVID rate especially relevant.

Regarding the second contingency, whether the 14-day testing positivity rate in the county where the relevant facilities are located is 5 percent or higher, the CDC reports that for the week ending May 14, 2022, the positivity rate for Anchorage was 8.84 percent¹³ and for Fairbanks North Star it was 7.14 percent.¹⁴

Aspirus directs that a mail ballot election may be appropriate where either one of the two contingencies described above are met. Here, the 14-day COVID case rate in the state of Alaska, as well as specifically in Anchorage and Fairbanks, is increasing, and the positivity rate is above 5 percent in both Anchorage and Fairbanks. I find these to be a sufficient basis to order a mail ballot election consistent with *Aspirus*.

III. CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

⁸ <https://experience.arcgis.com/experience/af2efc8bffb4cdc83c2d1a134354074/> (last viewed May 17, 2022).

⁹ <https://coronavirus.jhu.edu/region/us/alaska> (last viewed May 17, 2022).

¹⁰ <https://experience.arcgis.com/experience/af2efc8bffb4cdc83c2d1a134354074/> (last viewed May 17, 2022).

¹¹ https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Alaska&data-type=CommunityLevels&list_select_county=2020&null=CommunityLevels (last viewed May 17, 2022).

¹² https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Alaska&data-type=CommunityLevels&list_select_county=2090&null=CommunityLevels (last viewed May 17, 2022).

¹³ https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Alaska&data-type=CommunityLevels&list_select_county=2020&null=CommunityLevels (last viewed May 18, 2022).

¹⁴ https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Alaska&data-type=CommunityLevels&list_select_county=2090&null=CommunityLevels (last viewed May 18, 2022).

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁵
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of §9(c)(1) and §§2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of §9(b) of the Act:

INCLUDED: All full-time and regular part-time material handlers and employees engaged in the performance of installation work employed by the Employer and working at or out of the Employer's facilities located at 4134 Ingra Street, Anchorage, AK 99503, and 1899 Van Horn Road, Fairbanks, Alaska 99701.

EXCLUDED: All other employees, the production managers, vice president of operations, office clerical/administrative employees, confidential employees, and guards, and supervisors as defined in the Act.

5. The parties were unable to agree on the eligibility of installation managers and service technicians, as they do not agree on the supervisory status of these individuals. The parties have agreed that installation managers and service technicians will vote subject to challenge. In the event the challenged ballots are sufficient in number to affect the outcome of the election, the eligibility of the challenged voters will be determined by the Board in post-election proceedings.

A. Election Details

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Northwest Regional Council of Carpenters.

The election will be conducted by mail. On **Thursday, June 2, 2022**, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

¹⁵ The parties stipulated to the following commerce facts:

The Employer, an Alaska corporation with facilities in Anchorage and Fairbanks, Alaska, is engaged in the installation and replacement of windows and doors for residential customers. In the past 12 months, a representative period of time, the Employer derived gross revenues in excess of \$1,000,000 and purchased and received goods valued in excess of \$50,000, directly from points outside the State of Alaska. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Thursday, June 9, 2022**, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at **206-220-6300** or our national toll-free line at **1-866-667-NLRB (1-866-667-6572)**.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by **1:00 p.m. on Thursday, June 30, 2022**. All ballots will be commingled and counted by an agent of Region 19 of the National Labor Relations Board on **Thursday, June 30, 2022, at 1:00 p.m.** with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Regional Office, the Region will inform the parties with sufficient notice so that they may attend.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **May 14, 2022**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as directed above.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Monday, May 23, 2022**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to § 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: May 19, 2022

Ronald K. Hooks

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